

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELINDA A. ORR and U.S. POSTAL SERVICE,
MIDWEST CITY BRANCH, Midwest City, OK

*Docket No. 00-374; Submitted on the Record;
Issued November 15, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on December 22, 1998, March 2 and April 29, 1999; and (2) whether the Office properly determined that appellant's request for reconsideration, received by the Office on August 18, 1999, was untimely filed and did not present clear evidence of error.

On February 26, 1985 appellant, then a 28-year-old letter carrier, filed a notice of traumatic injury alleging that she sustained a left knee injury in the course of her federal employment duties. The Office accepted appellant's claim for a left knee sprain and torn meniscus, authorized three left knee surgeries, and paid appropriate compensation benefits. On June 28, 1988 appellant filed a notice of traumatic injury alleging that she sustained a right knee injury in the course of her federal employment duties. The Office accepted appellant's claim for bursitis of the right knee and in 1989, accepted that appellant's right knee condition was temporarily aggravated by her left knee condition. Finally, on December 17, 1990 appellant filed a claim for occupational disease alleging that she developed a left shoulder condition due to casing mail in the performance of duty. The Office accepted appellant's claim for a left shoulder sprain and rotator cuff calcific tendinitis, and subsequently accepted the additional conditions of right shoulder and bilateral elbow tendinitis as causally related to these injuries.

This case has a long and complex procedural history. On April 24, 1990 the Office granted appellant a schedule award for an 11 percent permanent impairment of her right lower extremity. On May 14, 1990 the Office granted appellant a schedule award for a total of 25 percent impairment of the left lower extremity. In a decision dated December 2, 1993, the Office found that appellant had been suitably reemployed in a sedentary position as a postal collect and delivery clerk, and reduced appellant's compensation to reflect her wage-earning capacity in that position. On March 17, 1995 the Office granted appellant a schedule award for a 20 percent impairment of the left upper extremity.

On January 25, 1996 the employing establishment offered appellant a position as a modified city carrier, which appellant accepted on February 27, 1996. Appellant stopped work on March 26, 1996, however, and on April 16, 1996 she filed a claim for recurrence of disability, alleging that she developed extreme pain in her left and right shoulders, elbows and back. In a decision dated July 16, 1996, the Office denied appellant's claim for a recurrence of disability due to her 1990 upper extremity injuries. Appellant requested an oral hearing and in a decision dated September 23, 1996, an Office hearing representative set aside the Office's prior decision and remanded the case for further medical development. On remand, after further developing the case, the Office issued a decision dated November 19, 1997, finding that appellant had failed to establish an inability to perform the duties of the modified duty job, and further finding that, therefore, she had neglected suitable work and was no longer entitled to compensation benefits. Appellant requested reconsideration, and in a decision dated April 6, 1998, the Office denied modification of the prior decision, finding that the weight of the medical evidence established that she could perform the modified carrier position. Appellant again requested reconsideration, and by decision dated June 22, 1998, the Office found that the evidence submitted by appellant in support of her request was repetitive and insufficient to warrant review of the prior decision.

On April 29, 1998 appellant filed a claim for recurrence of disability, alleging that she had developed disabling left shoulder and left and right knee conditions. In a decision dated August 4, 1998, the Office denied appellant's claim for a recurrence of disability due to her right knee condition, but in a decision dated September 16, 1998, the Office approved appellant's claim for a recurrence of disability due to her left knee condition.

By letter dated December 9, 1998, appellant requested reconsideration of the Office's August 4, 1998 decision denying appellant's claim for a recurrence of disability due to her right knee condition. In a decision dated December 22, 1998, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence, and was therefore insufficient to warrant review of the prior decision.

On January 21, 1999 the Office consolidated appellant's upper and lower extremity claims for more efficient adjudication.

By letter dated February 9, 1999, appellant again requested reconsideration and submitted a February 9, 1999 form report from her treating physician, Dr. Glenn L. Smith, as well as copies of the Office's August 4 and December 22, 1998 decisions denying appellant's claim for a recurrence of disability due to her right knee conditions, in support of her request. In a decision dated March 2, 1999, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence, and was therefore insufficient to warrant review of the prior decision.

By letter dated April 15, 1999, appellant requested reconsideration of the Office's April 6, 1998 decision finding that appellant had neglected suitable work. In a decision dated April 29, 1999, the Office noted that, while appellant's request for reconsideration was dated more than one year after the Office's decision, it would consider her request timely due to the confusing number of issues and decision which had been issued in her case. The Office denied appellant's request for reconsideration, however, on the grounds that the arguments raised were

invalid and irrelevant to the reasons for the denial of the claim and no new medical evidence had been submitted.

By letter dated August 12, 1999, and received by the Office on August 18, 1999, appellant submitted her final request for reconsideration, again challenging the Office's April 6, 1998 decision finding that she had neglected suitable work. In a decision dated September 3, 1999, the Office found that appellant's request for reconsideration was untimely filed and did not present clear evidence of error.

The only decisions before the Board on this appeal are those of the Office dated December 22, 1998, March 2 and April 29, 1999, in which it declined to reopen appellant's case for further merit review, and September 3, 1999, in which it found appellant's reconsideration request untimely filed. As more than one year elapsed from the date of issuance of the Office's last merit decision on April 6, 1998 and the filing of appellant's appeal on September 29, 1999, the Board lacks jurisdiction to review that decision.¹

The Board initially finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on December 22, 1998, March 2 and April 29, 1999.

Under section 8128(a) of the Federal Employees' Compensation Act,² the Office has the discretion to reopen a case for review on the merits. In its decisions issued prior to January 4, 1999, the Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,³ which provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁴

In support of her initial December 9, 1998 reconsideration request, appellant asserted that her treating physician, Dr. Glenn L. Smith, had thoroughly addressed the issue of her 1990 claim for a recurrence of disability due to her right knee conditions, but that his medical reports might have been associated with appellant's claim for her left knee condition. A review of the entire consolidated file, however, revealed no medical reports from Dr. Smith, or any other physician, dated between appellant's 1990 alleged recurrence of disability due to her right knee condition and the Office's decision, other than those medical reports previously considered by the Office. Material which is repetitious or duplicative of that already in the case record has no evidentiary

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

value in establishing a claim and does not constitute a basis for reopening a case.⁵ As the record contains no medical evidence relevant to whether appellant sustained a recurrence of disability in 1990 causally related to her accepted right knee condition, aside from that evidence previously considered by the Office, the medical evidence of record is insufficient to require the Office to reopen appellant's claim for review of the merits pursuant to Section 10.138(b)(1)(ii). Therefore, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on December 22, 1998.

With respect to appellant's February 9 and April 15, 1999, requests for reconsideration, as these requests were made subsequent to the promulgation of the new regulations, effective January 4, 1999, the Office must exercise this discretion in accordance with the guidelines set forth in Section 10.606 of Title 20 of the Code of Federal Regulations. Section 10.606 provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁶ Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.

In support of her February 9, 1999 request for reconsideration, appellant submitted copies of the Office's August 4 and December 22, 1998 decisions denying her claim for a recurrence of disability, as well as February 9, 1999 work capacity evaluation form from her treating physician, Dr. Glenn L. Smith. In this report, Dr. Smith states that appellant is totally disabled for work due to a torn ACL left knee, torn medial meniscus right knee, tendinitis and impingement syndrome left shoulder, right shoulder strain and sprain, and lateral epicondylitis, and states that appellant will need shoulder rehabilitation before going back to work. Evidence which does not address the particular issue involved does not constitute a basis for reopening the claim.⁷ As Dr. Smith did not offer a rationalized opinion as to whether appellant suffered a recurrence of disability in 1990, causally related to her accepted right knee conditions, this report is insufficient to require the Office to reopen appellant's claim for a review of the merits.⁸ As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on March 2, 1999.

In her April 15, 1999 request for reconsideration, appellant challenged the Office's April 6, 1998 decision finding that she had neglected to perform suitable work. Appellant asserted that as the January 1996 job offer accommodated only her upper extremity conditions, and did not accommodate her physical restrictions stemming from her bilateral accepted knee conditions, the job was, in fact, not suitable. In addition to duplicate copies of correspondence

⁵ See *James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

⁶ 20 C.F.R. § 10.606(b).

⁷ *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁸ *Id.*

from the Office and employing establishment, appellant submitted additional medical evidence from Dr. Smith.⁹ In a work capacity evaluation form dated January 22, 1999, Dr. Smith stated that appellant was permanently restricted to working four hours a day due to her right shoulder injury. In a narrative treatment note dated February 5, 1999, Dr. Smith listed his findings after examining appellant's shoulders, elbows and knees, stated that appellant remained temporarily totally disabled, and recommended that she continue with physical therapy. However, as neither of Dr. Smith's reports addresses appellant's ability to perform the January 1996 offered modified duty job, these reports are not relevant to the issues decided by the Office in its April 6, 1999 decision and, therefore, do not constitute a basis for reopening the claim.¹⁰ As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on April 29, 1999.

The Board further finds that appellant's final request for reconsideration, dated August 12, 1999 and received by the Office on August 18, 1999, was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Act¹¹ does not entitle a claimant to a review of an Office decision as a matter of right.¹² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).¹³ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹⁵

The Office properly determined in this case that appellant failed to file a timely application for review on August 18, 1999. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting

⁹ The duplicate copies of Office correspondence are insufficient to warrant reopening appellant's claim, as material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case. See *James A. England*; *Kenneth R. Mroczkowski*; *Marta Z. DeGuzman*; *Katherine A. Williamson*, *supra* note 5.

¹⁰ *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

¹¹ 5 U.S.C. § 8128(a).

¹² *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹³ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

¹⁴ 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁵ See *Veletta C. Coleman*, *supra* note 12.

reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁶ In her August 18, 1999 request for reconsideration, appellant reiterates her prior argument that the employing establishment's 1996 job offer was invalid, as it did not accommodate all of her physical restrictions. Therefore, she asserts, the Office erred in finding that she neglected suitable work. As noted above, the Office issued its last merit decision on this issue on April 6, 1998, wherein the Office affirmed its November 19, 1997 finding that appellant had neglected suitable work. As appellant's reconsideration request received on August 18, 1999 was outside the one-year time limit which began the day after April 6, 1998, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.606(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁹

In the present case, appellant did not submit any new factual or medical evidence in support of her claim, but merely reiterated her earlier arguments, already fully considered by the Office. Therefore, as appellant did not submit any medical or factual evidence sufficient to show that the Office erred in its prior decision that appellant neglected to perform suitable work, the Office's September 3, 1999 decision properly determined that appellant had not presented clear evidence of error,

¹⁶ *Veletta C. Coleman*, *supra* note 12; *Larry L. Lilton*, 44 ECAB 243 (1992).

¹⁷ *Veletta C. Coleman*, *supra* note 12; *Gregory Griffin*, *supra* note 14.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

¹⁹ *Veletta C. Coleman*, *supra* note 12.

The decisions of the Office of Workers' Compensation Programs dated September 3, April 29 and March 2, 1999 and December 22, 1998 are hereby affirmed.²⁰

Dated, Washington, DC
November 15, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

²⁰ The Board notes that on October 19, 1999, the Office denied appellant's request to change physicians. This decision is not before the Board, however, as it was issued subsequent to appellant's September 29, 1999 appeal.